

Proportionality and Evictions

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This chapter considers the concept and application of the principle of proportionality in relation to evictions from home, arising from Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR). It builds on the presentations at the Fondation Abbe Pierre/ FEANTSA *The European Contribution to the Right to Housing Standards, Litigation and Advocacy Conference*, May 2022.¹

Any interference with the right to respect for private and family life must meet a “*proportionality test*”, and there is a growing body of jurisprudence from the European Court of Human Rights (ECtHR) on this point. This chapter outlines this case law, which is limited to cases involving the vertical application of human rights, i.e., between States and a private party.² It also considers how the principle is also being applied in a horizontal and more expansive way through EU law and the UN human rights complaints system. It concludes that the limitations of ECHR civil and political rights in this area are becoming evident, while much scope remains within EU law and UN monitoring systems.

ECHR - Article 8

The Council of Europe, established in 1949, promotes housing rights in an oblique way through its ECHR.³ Article 8 ECHR states:

“1. *Everyone has the right to respect for (...) his home (...).*”

1.* Thanks to Gëzim Zejnullahu, PhD researcher at University of Galway for assistance with this chapter.

All the presentations are available at:

<https://www.housingrightswatch.org/news/european-contribution-right-housing-standards-litigation-and-advocacy>.

2. Many States have adopted the ECHR into their legislation or in the case of monist legal systems it is automatically part of national law once ratified. This chapter does not consider the national court decisions relating to Article 8.

3. Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005)* <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>. It is important to reference the more extensive socio-economic rights set out in the Council of Europe’s European Social Charter and Revised Charter of the Council of Europe and its specific right to housing in Article 31, and the almost total failure of the ECtHR to integrate that jurisprudence into its case civil and political rights case law. See Council of Europe, European Treaty Series – No. 35: European Social Charter, Turin, 18 October 1961. (Revised) Council of Europe, Strasbourg 3 May 1996. Available at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp. Article 31 is entirely relevant to the consideration of this Council of Europe organ and states: With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 1. to promote access to the housing of an adequate standard; 2. to prevent and reduce homelessness with a view to its gradual elimination; 3. to make the price of housing accessible to those without adequate resources.

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*⁴

Article 8 ECHR rights do not grant any right to a home, merely a positive obligation on the State to respect the right to home.⁵ This was reiterated in *Faulkner v Ireland*:⁶

“98. (...) *this provision does not recognise, as such, a right to be provided with a home (see Ghailan and Others v Spain, no. 36366/14, § 53, 23 March 2021, and further references therein), nor does it confer a right to live in a particular location (see Garib v the Netherlands [GC], no. 43494/09, § 141, 6 November 2017, and further references therein), or guarantee the right to have one’s housing problems solved by the authorities, as the scope of any positive obligation to house the homeless is limited (see Hudorovič and Others v Slovenia, nos. 24816/14 and 25140/14, § 114, 10 March 2020.*”

Thus, Article 8 rights act negatively, as a protection against arbitrary evictions from dwellings or land.

Of course, the ECtHR also regards “home” as more than temporary occupancy of a building or land and requires the existence of sufficient and continuous links with the place occupied, even if such occupancy is illegal,⁷ as the case of *Faulkner v Ireland and McDonagh v Ireland* still reminds us:⁸

“91. *The Court observes that whether or not a particular premises constitutes a ‘home’ – an autonomous concept under the Convention – and thus attracts the protection of Article 8 § 1 will depend on the existence of sufficient and continuous links with a specific place (see, among others, Winterstein and Others, cited above, § 141)⁹. Furthermore, whether a property is to be classified as a ‘home’ is a question of fact and does not depend on the lawfulness of the occupation under domestic law (see Hirtu and Others v. France, no. 24720/13, § 65, 14 May 2020 and the authorities cited therein) (...)*”

Thus, the ECtHR has recognised the inherent fluidity of the home and the different forms and shapes that it can assume.¹⁰

4. The relationship between Article 8 ECHR and housing in the jurisprudence of the ECtHR is summarised in the ECtHR Guide on Article 8 of the European Convention on Human Rights Right to respect for private and family life, home and correspondence. (Updated on 31 August 2022). Available at: https://www.echr.coe.int/documents/guide_art_8_eng.pdf.

5. For an review of all European law and policy related to evictions see Kenna, P. Nasarre-Aznar, S., Sparkes, P. & Schmid, C.U. (2018)(ed.) *Loss of Homes and Evictions across Europe: A Comparative Legal Examination*, Cheltenham, Edward Elgar; Nield, S. “Article 8 respect for Home – A Human Property Right?” 23 *King’s Law Journal*, 2013, 147.

6. *Faulkner v Ireland and McDonagh v Ireland*, Application nos. 30391/18 and 30416/18. Judgment 31 March 2022, para 98.

7. Vojvodić, J. D. “Respect of the Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the Recent Case Law of the European Court of Human Rights”, *Zbornik Radova Pravnog Fakulteta Novi Sad*, 2020. Available at: <https://scindeks-clanci.ceon.rs/data/pdf/0550-2179/2020/0550-21792004533V.pdf>.

8. Application nos. 30391/18 and 30416/18. Judgment 31 March 2022, para 91.

9. *Winterstein and Others v France*, Application no. 27013/07, Judgment, 17 October 2013. See also *Connors v the United Kingdom*, Application no. 66746/01, Judgment, 27 May 2004; *McCann v the United Kingdom*, Application no. 19009/04, Judgment, 13 May 2008.

10. Cittadini, S. (2022) “A right to home or an individual preference? The impact of the definition of home in international and European legislation on cases concerning Roma, Travellers and Gypsies”, *Romani Studies* 5, Vol. 32, No. 1 (2022), 85–103. Available at: <https://muse.jhu.edu/article/859937/pdf>.

The proportionality of any action which interferes with this right to respect for the home has been established as a core element in the protection of Article 8 rights.¹¹ The questions posed in the “*proportionality test*” arising from Article 8 ECHR were elaborately defined by the ECHR. In *Yordanova and Others v Bulgaria*¹², where the ECtHR reiterated that a national court must examine whether the interference with the “*home*”, if it materialises, (i) firstly pursues a legitimate aim, (ii) then, is “*necessary in a democratic society*”.

“117. An interference will be considered ‘necessary in a democratic society’ for a legitimate aim if it answers a ‘pressing social need’ and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention (see, among other authorities, Smith and Grady v the United Kingdom, Nos. 33985/96 and 33986/96, 27 September 1999, §§ 88, ECHR 1999-VI)”.

A margin of appreciation is left to the national authorities to assess whether the interference is proportionate to the legitimate aim pursued. However, this margin of appreciation will vary according to the nature of the ECtHR rights at issue. In the application of wider social and economic policies related to housing, such as planning policies, national authorities enjoy a wide margin of appreciation. However, the margin of appreciation left to the national authorities will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of its key privacy and personal rights. *Yordanova* was very explicit about this dimension of Article 8 ECHR:

“118. (ii) (...) Since Article 8 concerns rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community, where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant (see, among many others, Connors, cited above, § 82);

(iii) The procedural safeguards available to the individual will be especially material in determining whether the respondent state has remained within its margin of appreciation. In particular, the ECHR must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see Buckley, cited above, pp. 1292–93, § 76, and Chapman, cited above, § 92). The ‘necessary in a democratic society’ requirement under Article 8 § 2 raises a question of procedure as well of substance (see McCann, § 26);

(iv) Since the loss of one’s home is a most extreme form of interference with the right under Article 8 to respect for one’s home, any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8, notwithstanding that, under domestic law, he has no right of occupation (...). This means,

11. Kenna, P. “Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights”, 2008 *European Human Rights Law Review* 2, 193; Kenna, P. and Gailiute, D. “Growing coordination in housing rights jurisprudence in Europe?”, 2013 *European Human Rights Law Review* 6, 606.

12. *Yordanova and Others v Bulgaria* Application No. 25446/06, Judgment, 24 September 2012.

among other things, that where relevant arguments concerning the proportionality of the interference have been raised by the applicant in domestic judicial proceedings, the domestic courts should examine them in detail and provide adequate reasons (ibid., §§ 67–69);

(v) Where the national authorities, in their decisions ordering and upholding the applicant's eviction, have not given any explanation or put forward any arguments demonstrating that the applicant's eviction was necessary, the court [ECtHR] may draw the inference that the State's legitimate interest in being able to control its property should come second to the applicant's right to respect for his home".¹³

National authorities must also take into account the position of vulnerable and disadvantaged persons or groups, which require special consideration to be given to their needs and their different lifestyle, both in any planning framework and in specific cases, and in the proportionality assessment that they must undertake.¹⁴

When it comes to illegal construction in breach of planning laws, the factors likely to be of prominence when determining the proportionality of the measure are:

"64. (...) whether or not the home was established unlawfully, whether or not the persons concerned did so knowingly, the nature and degree of the illegality at issue, the precise nature of the interest sought to be protected by the demolition, whether suitable alternative accommodation is available to the persons affected by the demolition and whether there are less severe ways of dealing with the case; the list is not exhaustive (see Ivanova and Cherkezov, cited above, § 53; Winterstein and Others, cited above, § 148 (€); and Kaminskas, cited above, §§ 54 and 57)".¹⁵

In *Faulkner v Ireland* and *McDonagh v Ireland*,¹⁶ involving the eviction of Travellers from an unauthorised site, it would appear that the evictions there were undertaken to facilitate a contractor who was threatening to sue the Local Authority, and the safety risks only arose as a result of the new road construction.¹⁷ The decision relied on the broad "*margin of appreciation*" which pertains in the sphere of social and economic policy, and also mentioned the issue of safety.¹⁸ The ECtHR held that there was no breach of the limited intrusion restrictions into the "*personal sphere*" of the holder of Article 8 rights, in relation to the individual claimant "*identity, self-*

13. *Ibid.*, para 118.

14. *Ibid.*, para 129. However, in *Hirtu and Others v. France*, (Application no 24720/13, 14 May 2020), while the clearance of a Gypsy encampment clearly had repercussions on the private and family life of those evicted, who belonged to an underprivileged social group, in fact the proportionality of the interference was assessed for the first time by an Administrative Court 18 months after the eviction – See presentation by Senada Sali, Legal Director, European Roma Rights Centre at Fondation Abbe Pierre/FEANTSA *The European Contribution to the Right to Housing Standards, Litigation and Advocacy Conference*, May 2022. Available at: https://www.housingrightswatch.org/sites/default/files/Presentation_ERRC_forced_evictions_SS.pptx_.pdf.

15. *Ghalian v Spain* (Application no 36366/4. Judgment 23 March 2021).

16. (Application nos. 30391/18 and 30416/18. Judgment 31 March 2022).

17. See *Faulkner v Ireland*, para 14 : "*The Council appointed a contractor on 23 June 2017. After works commenced in September 2017, the contractor encountered difficulties due to the occupation of the Coonagh site. The contractor's safety inspection stated that large vehicles using the road were passing close to caravans with young children in their vicinity, preventing the vehicles from safely accessing and leaving the construction site, and creating a significant risk to the public and to the occupants of the site. On 2 October 2017, the contractor notified the Council that works must cease until the site's occupants were removed, submitted a contractual claim for 531,381 euros (EUR) arising from this delay and continued to charge the Council a further EUR 10,000 for every day vehicles were unable to access the construction site.*"

18. *Faulkner v Ireland*, para 109. "*In addition, the Council's intervention had also been dictated by considerations of public safety, both for the children and adults living on the Coonagh site and the construction workers seeking to carry out their tasks without harming either.*"

determination, physical and moral integrity, maintenance of relationships with others and to a persons' settled and secure place in the community".¹⁹ The principle of the positive obligation imposed on the Contracting States by virtue of Article 8, to facilitate the way of life of the Roma and Travellers, did not prevent the eviction, and the fact that the applicants had been rehoused (although not in Traveller-specific accommodation) was found to be significant. Thus, while proportionality in relation to evictions requires a clear proportionality assessment, this does not guarantee alternative Traveller-specific accommodation, or full protection against eviction.

Limitations of Article 8 - no "horizontal" application between private parties

The horizontal effect of Article 8 ECHR, i.e. whether it applies to evictions from private rented housing or as a result of mortgage repossessions, is problematic.²⁰ In *Vrzic v Croatia*²¹ the ECtHR held that in all previous Article 8 cases involving eviction, the applicants were living in state-owned or socially owned accommodation flats, and an important aspect of finding a violation was the fact that there was no other private interest at stake. The ECtHR held that there was no violation of Article 8, despite the absence of a proportionality assessment. Indeed, the ECtHR found that in this specific case the forced sale of the house had to be considered "*necessary in a democratic society*" in view of the risks deliberately taken by the plaintiffs in borrowing a substantial amount of money for their business, and using their home as collateral. "*By not objecting to the enforcement order, which specifically concerned the sale of their house, the applicants tacitly agreed to its sale in the enforcement proceedings*".²² However, this did not mean that the ECtHR would never examine the procedures in cases involving private parties:

"101. The Court is mindful of the fact that the present case concerns proceedings between private parties, namely the applicants and their creditors on the one hand and the applicants and the purchaser of their house on the other hand. However, even in cases involving private litigation, the State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law (see Anheuser-Busch Inc. v Portugal [GC], no. 73049/01, § 83, ECHR 2007-I; J.A. Pye, cited above, § 57; and Zagrebačka banka d.d. v Croatia, no. 39544/05, §§ 250 and 251, 12 December 2013)".

In *F.J.M. v the United Kingdom* (2018)²³ the ECtHR held "*prior verification of the proportionality of a landlord's repossession of his property and the eviction of the tenant could not be required in the*

19. *Faulkner v Ireland* and *McDonagh v Ireland*, Application nos. 30391/18 and 30416/18, Judgment 31 March 2022, para 95 (ii).

20. Orthodox human rights discourse often refers to "non-state actors" in this context, which, of course, in housing terms encompasses all private and corporate ownership of housing and land – in other words the very largest part and in some cases almost all. The horizontal application of right means that they could be enforced in the relations between private parties (ie. non State).

21. ECtHR Application No. 43777/13 Judgment 12 July 2016.

22. *Ibid*, Para 70: "*When the enforcement order for the sale of their house was issued, the applicants did not challenge that order by means of an appeal, as provided for under section 11 of the Enforcement Act.*"

23. *F.J.M. v The United Kingdom*, Application no. 6202/16, Judgment 6 November 2018, paras 41-46.

context of a tenancy involving private persons”.²⁴ However, in the case of *Jansons v Latvia* (2022)²⁵ the ECtHR held that where the applicant had been “arbitrarily evicted without a lawful eviction order” from a private apartment by a private company and thus “without his right to reside in the apartment – or the absence thereof – having been first determined by the domestic courts” there was a violation of Article 8. The procedural safeguards provided under domestic law had failed to prevent this arbitrary interference with Article 8 rights, and thus, it would now appear that even in cases involving purely private parties a possession order is still required before a lawful eviction can take place.²⁶

Proportionality in the EU Charter of Fundamental Rights (EUCFR)

The EUCFR is part of EU Treaty law and binding on Member States when they implement EU law, and it also obliges the EU institutions and bodies to respect the rights, observe the principles and promote the application of the Charter within their respective competences and mandates.²⁷ A number of provisions of the EUCFR were directly inspired by the European Convention on Human Rights. Many directly reflect ECHR rights, thus, it can be expected that the CJEU would take into account the Council of Europe interpretations of these rights.²⁸ Indeed, the *Explanations Relating to the Charter of Fundamental Rights* (The Explanations), state “The rights guaranteed in Article 7 [of the EUCFR] correspond to those guaranteed by Article 8 of the ECHR”.²⁹

However, while the EUCFR does not grant stand-alone rights, it must be applied in the interpretation of EU law (primary and secondary), and thus, in situations where EU applies the EUCFR also applies. There are examples of this interpretative role of the EUCFR in housing-related cases, such as *Kamberaj*,³⁰ *Sanchez Morcillo* (I)(2014),³¹ and *Kusionova*.³² Indeed, in *Kusionova* the Court of Justice of the EU (“CJEU”) specifically invoked Article 7 EUCFR to establish whether a term relating to extrajudicial enforcement of the security for a debt on immovable property in a consumer

24. For an examination of the implications of this case see Casla, K. “Unpredictable and damaging? A human rights case for the proportionality assessment of evictions in the private rental sector” (2022) (3) *European Human Rights Law Review* 253-272.

25. App no 1434/14 (ECtHR, 8 September 2022).

26. App no 1434/14 (ECtHR, 8 September 2022). “In that respect, the present case should also be distinguished from the cases of *Vrzić v Croatia* (no. 43777/13, 12 July 2016) and *F.J.M. v the United Kingdom* ((dec.), no. 76202/16, 6 November 2018), where the Court analysed court-ordered evictions and clarified that the Convention did not require that tenants be entitled to seek a proportionality assessment where possession was being sought by private-sector property owners. In contrast, the present case concerns the applicant’s complaint that he was evicted without the lawfulness of this interference having been determined, and in a situation where, moreover, the requirement of a prior judicial review was expressly laid out in domestic law (see paragraph 32 above)” (para 88).

27. *Charter of Fundamental Rights of the European Union*, OJ 2010/C 83/02. Article 51.

28. See De Schutter, O. (2016) *The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights – Study for the AFCO Committee European Parliament*, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU\(2016\)536488_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536488/IPOL_STU(2016)536488_EN.pdf), p. 40.

29. *Explanations relating to the Charter of Fundamental Rights* (OJ 2007/C 303/02). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>. However, the Charter also states that in relation to the Explanations: “Although they do not as such have the status of law, they [the Explanations] are a valuable tool of interpretation intended to clarify the provisions of the Charter.”.

30. Case 571/10 Grand Chamber, 24 April 2012. Using Article 34(3). See also Case C-94/20, *Land Oberösterreich v KV*, Judgment 10 June 2021.

31. Case C-169/14, *Morcillo and Abril García v Banco Bilbao*, EU:C:2014:2099. Using Article 47. See J. van Duin, “Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures Under Directive 93/13/EEC”, (2017) *Amsterdam Law School Research Paper* 37: 11. Available at SSRN: <https://ssrn.com/abstract=3034205> or <http://dx.doi.org/10.2139/ssrn.3034205>.

32. Case C-34/13, *Monika Kušionová v SMART Capital, a.s.*, EU:C:2014:2189.

lending contract was unfair.³³ Significantly, the CJEU held that “Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13”,³⁴ setting out the clear link with Article 8 ECHR in this case:

“63. The loss of a family home is not only such as to seriously undermine consumer rights (the judgment in *Aziz*, EU:C:2013:164, paragraph 61), but it also places the family of the consumer concerned in a particularly vulnerable position (see, to that effect, the Order of the President of the Court in *Sánchez Morcillo and Abril García*, EU:C:2014:1388, paragraph 11).

64. In that regard, the European Court of Human Rights has held, first, that the loss of a home is one of the most serious breaches of the right to respect for the home and, secondly, that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed (see the judgments of the European Court of Human Rights in *McCann v United Kingdom*, application No. 19009/04, paragraph 50, ECHR 2008, and *Rousk v Sweden*, application No. 27183/04, paragraph 137).

65. Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13.

66. With regard in particular to the consequences of the eviction of the consumer and his family from the accommodation forming their principal family home, the Court has already emphasised the importance for the national court, to provide for interim measures by which unlawful mortgage enforcement proceedings may be suspended or terminated where the grant of such measures proves necessary in order to ensure the effectiveness of the protection intended by Directive 93/13 (see, to that effect, the judgment in *Aziz*, EU:C:2013:164, paragraph 59)”.³⁵

The CJEU did not really elaborate on the complexity of the ECHR jurisprudence beyond reciting the iconic passage in detail, leaving it for the national court to carry out this assessment.³⁵ However, it is clear that the interpretation of EU secondary legislation has become the “nexus” between national procedural law, consumer law and the EUCFR.³⁶ Indeed, the Opinion of advocate général Laila Medina in *SP, CI v Všeobecná úverová banka, a.s.*³⁷ reiterated these links in the CJEU juris-

33. Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21 April 1993.

34. See Case C-34/13 paras 63–65. See also Domurath, I., & Mak, C. (2020). “Private Law and Housing Justice in Europe”. MLR, 83(6), 1188–1220.

35. Simon-Moreno, H. & Kenna, P. (2019) “Towards a new EU regulatory law on residential mortgage lending”, *Journal of Property, Planning and Environmental Law*, 11(1) 51–66; Kenna, P. & Simon-Moreno, H. (2019) “Towards a common standard of protection of the right to housing in Europe through the charter of fundamental rights”, *European Law Journal*, 25 (6) 608–622: <https://doi-org.proxy-ub.rug.nl/10.1111/eulj.12348>; Rutgers, J. “The right to housing (article 7 of the Charter) and unfair terms in general conditions”, in H. Collins (ed.) (2017) *European Contract Law and the Charter of Fundamental Rights* (Cambridge, Intersentia), 132.

36. See Kenna, P. “Introduction” in Kenna, P., Nasarre-Aznar, S., Sparkes, P. & Schmid, C.U. (ed.) (2018) *Loss of Homes and Evictions across Europe A Comparative Legal and Policy Examination* (Edward Elgar Publishing, Cheltenham), p. 41. See also Beka, A. (2018) *The Active Role of Courts in Consumer Litigation – Applying EU Law of National Court’s Own Motion* (Cambridge, Intersentia).

37. Case C-598/21 *SP, CI v Všeobecná úverová banka, a.s.* Opinion of AG Medina 12 January 2023. <https://curia.europa.eu/juris/document/document.jsf?text=&d ocid=269163&pageIndex=o&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=13006>.

prudence, and emphasised that Article 7 of the EUCFR falls within the Title II part of the EUCFR entitled “*Freedoms*”, and not under the “*Solidarity*” provisions, containing Article 34(3) on the right to social and housing assistance which can only be applied in the context of EU social inclusion policies.³⁸ This is an important distinction, which recognises the importance of the right to respect for “*home*” within the corpus of EU law.

One outcome of CJEU legal developments relating to Article 7 EUCFR is that ECHR Article 8 rights can now be applied horizontally - via the EUCFR - to relations between private contracting parties.³⁹ This marks a major enhancement in the protection of borrowers against mortgage lenders.⁴⁰ The horizontal application of fundamental rights under the EUCFR (i.e. between private parties) can also be extended to the duty of national legislators to pass legislation in a Charter-compliant way, and, to subsequent judicial interpretations.⁴¹ The EUCFR overcomes many of the limitations of other human rights instruments, such as the ECHR, which are interpreted as granting only vertical sets of rights, i.e. private parties against State action.

Proportionality under the UNCESCR

In 2013, the UN Committee on Economic, Social and Cultural and Cultural Rights (“*UNCESCR Committee*” or the “*Committee*”) adopted an Optional Protocol⁴², enabling individual complaints to be made to the Committee on violations of the International Covenant on Economic, Social and Cultural Rights (“*ICESCR*”). This facilitated the Committee to further elucidate and develop the scope of ICESCR housing rights under Article 11. Many individual complaints related to evictions, with Spanish cases taking a major role.⁴⁵ Moving beyond the confines of Article 8 ECHR jurisprudence on “*proportionality*” the Committee has broadened the application of the principle to a wider set of circumstances, as well as clarifying the obligations of the State overall, in the process.⁴⁴

The first “*Communication*” issued by the Committee was in relation to *Ben Djazia and al. v Spain*⁴⁵ where the applicant was being evicted from an apartment at the end of a tenancy.⁴⁶ The eviction had been lawful, but the applicant and his with two children were now homeless. For the Spanish authorities, the role of the State was limited to that of mediator in a dispute between private

38. The *Explanations* state that “*The Union must respect it in the context of policies based on Article 153 of the Treaty on the Functioning of the European Union*”.

39. Enforceability of Charter rights between private entities has been approved in such cases as C414/16, *Egenberger*, EU:C:2018:257, para. 76); Joined Cases C-569/16 and C-570/16, *Stadt Wuppertal v Bauer and Willmeroth v Broßonn*, ECLI:EU:C:2018:871.

40. Collins, H. “The Challenges Presented by the Fundamental Rights to Private Law”, in Barker, K., Fairweather, K. and Grantham, R. (eds.), *Private Law in the 21st Century* (Bloomsbury, 2017), 215.

41. Cherednychenko, O. “Fundamental Rights, European Private Law, and Financial Services”, in Micklitz, H. ed.), *Constitutionalization of European Private Law*, XXII/2 (Oxford University Press, 2014), 203-204.

42. UN Doc A/63/435. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: 2008. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4

43. Sánchez, B. The UN Committee on Economic, Social and Cultural Rights Decision in *López- Albán v Spain*: The Need for a Proportionality Assessment in Eviction Procedures” (2020) 10 *Lex Social* 371. Due credit for presenting many of these cases must go to Javier Rubio, Centro de Asesoría y Estudios Sociales. S. Coop, Madrid.

44. Grohmann, N. “*Tracing the Development of the Proportionality Analysis in Relation to Forced Evictions under the ICESCR*” *Human Rights Law Review*, 2022, 22, 1-24.

45. (5/2015), E/C.12/61/D/5/2015.

46. All the Communications under the Optional Protocol to the ICESCR are available online at <https://www.gi-escr.org/cescr-jurisprudence>.

parties (similar to the approach taken by the ECtHR in *Vrzić v Croatia*⁴⁷ and *F.J.M. v UK*)⁴⁸. In this context, however, the Committee held that the State party had an obligation to guarantee that any eviction does not violate Article 11 (1) ICESCR.⁴⁹ The State was obliged to protect ICESCR rights from both direct and indirect interference. The Committee unequivocally stated that “*the scope of the provisions of the Covenant extends to relations between individuals*”.⁵⁰ The Committee focused on the failure to provide alternative accommodation and held that in cases of eviction, this *lacuna* could amount to a violation of Article 11 unless the State took all appropriate measures to the maximum of its available resources.⁵¹

In *López Albán v Spain*⁵² the applicant was the mother of six children and had leased an apartment from a person with no legal title to it. The actual owner (bank) sought possession, which was granted by a local court, and the family were evicted. The Committee considered such forced evictions from dwellings where the occupant did not have a legal right to occupy, and held that “*evictions are prima facie incompatible with the Covenant [ICESCR] and can only be justified in the most exceptional circumstances*”.⁵³ The duty on a State party to the ICESCR to ensure that that alternative accommodation is available applies regardless of who is causing the eviction – even a private entity. The Committee noted that the national court “*did not conduct an analysis of the proportionality of the legitimate objective of the eviction to its consequences for the persons evicted*”⁵⁴. Thus, the State party had violated Article 11 ICESCR. However, the Committee held that the requirement to carry out a proportionality assessment also flowed from Article 4 ICESCR as well as Article 11.⁵⁵

The case of *Rosario Gómez Limón Pardo v Spain*⁵⁶ concerned an elderly woman who was evicted from an apartment that she had rented for most of her life. She was not entitled to social housing and claimed that she was not offered appropriate alternative accommodation by the State. This meant that she was forced to move into temporary accommodation where she lacked any security of tenure. In the clearest exposition of the requirements of the proportionality analysis from the perspective of the ICESCR the Committee held that:

“9.4. When an eviction might result in a person’s being deprived of access to adequate housing and exposed to a risk of destitution or some other violation of his or her Covenant rights, an obligation to analyse the proportionality of the measure arises. This obligation flows from the interpretation of the State party’s obligations under article 2 (1) of the Covenant, read in conjunction with article 11, and in accordance with the requirements of article 4. (...) Firstly,

47. ECtHR Application no. 43777/13 Judgment 12 July 2016.

48. ECtHR Application no. 6202/16, Judgment 6 November 2018.

49. *Ben Djazia et al. v Spain*, Para 14.1.

50. *Ibid.*, Para 14.2.

51. *Ibid.*, Para 16.6.

52. (37/2018), E/C.12/66/D/37/2018.

53. *López Albán v Spain*, para 8.2. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E/C.12/66/D/37/2018&Lang=en

54. *López Albán v Spain*, para 11.5.

55. Article 4 ICESCR states: The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

56. (52/2018), E/C.12/67/D/52/2018. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?Lang=en&symbolno=E%2FC.12%2F67%2FD%2F52%2F2018

*the limitation must be determined by law. Secondly, it must promote the general welfare in a democratic society. Thirdly, it must be suited to the legitimate purpose cited. Fourthly, the limitation must be necessary, in the sense that if there is more than one measure that could reasonably be expected to serve the purpose of the limitation, the least restrictive measure must be chosen. Lastly, the benefits of the limitation in promoting the general welfare must outweigh the impacts on the enjoyment of the right being limited. The more serious the impact on the author's Covenant rights, the greater the scrutiny that must be given to the grounds invoked for such a limitation. This analysis of the proportionality of the measure must be carried out by a judicial or other impartial and independent authority with the power to order the cessation of the violation and to provide an effective remedy. This authority must analyse whether the eviction is compatible with the Covenant, including with regard to the elements of the proportionality test required by article 4 of the Covenant as described above.*⁵⁷

9.5. (...) A State will be committing a violation of the right to adequate housing if it stipulates that a person whose rental contract is terminated must be evicted immediately, without regard to the circumstances in which the eviction order would be carried out."⁵⁸

Thus, the requirement of proportionality in the context of forced eviction has now emerged as an established procedural safeguard in UNCESCR monitoring of the right to housing under Article 11 ICESCR – even in cases of private rented housing law. In its Concluding Observations to Latvia in 2021, the UNCESCR noted its concern about a new draft Law on Residential Tenancy, which “*weakens the rights of the tenants considerably, and that landlords will be allowed to bring actions before domestic courts requesting the eviction of tenants on a no-contest basis*”.⁵⁹ The UNCESCR recommended that the courts apply a proportionality analysis in their decisions on eviction of tenants, in cooperation with the social services offices concerned, so that tenants who fail to pay the rent under difficult circumstances will not become homeless.⁶⁰

Thus, the UNCESCR might present itself as a strategic choice for complainants from Europe in countries which have ratified the Optional Protocol, leaving aside the normative difference between a judgment rendered in Strasbourg and the views adopted in Geneva.⁶¹

57. *Rosario Gómez Limón Pardo v Spain*, para 9.4.

58. *Ibid.*, para 9.5.

59. UN Doc. E/C.12/LVA/CO/2. UNCESCR, Concluding observations regarding Latvia 30 March 2021. Para 36. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/075/46/PDF/G2107546.pdf?OpenElement>

60. *Ibid.*, para 37.

61. *Ibid.*, at 23. Council of Europe States which have ratified the Optional Protocol on Economic, Social and Cultural Rights at October 2022 are: Armenia, Belgium, Bosnia and Herzegovina, Finland, France, Italy, Luxembourg, Montenegro, Portugal, San Marino, Slovakia and Spain.

Conclusions

The contentious role of the ECtHR in defining human rights, and its increasing deference to States “*margin of appreciation*” especially on rights which involve any socio-economic issues, are becoming evident, despite the powerful rationale set out in *Airey*.⁶²

While any interference with the “*right to respect for one’s home*” under Article 8 ECHR must satisfy a proportionality test, this only applies in a “*vertical*” way within the ECHR jurisprudence in relations between the applicant and the State (largely public/state land and housing). It reflects the traditional liberal concept of civil and political rights as barriers to interference with liberty and property by the State – reflecting classical liberal political development against feudal systems. Although Article 8 cases have established important precedents in relation to evictions from State from public land and buildings, the great majority of evictions take place today – not from State land, but as a result of the termination of private housing relationship, tenancies or contracts – even mortgage defaults. The ECtHR, in one significant case, *Vrzic v Croatia*⁶³, has pointed out that even in cases involving purely private (non-State) parties, the State is under an obligation to ensure the necessary procedural guarantees which enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law.

However, the horizontal application of the right to respect for home (ie. between private parties, landlords, lenders, tenants/borrowers, squatters on private land) is being better advanced in EU law and in the UN human rights monitoring systems. This is leading to a more expansive and modern approach, which addresses the contemporary place of consumer law and human rights law, as well as established modern State obligations in housing. There is much room for the ECtHR to move beyond its current deference to the “*margin of appreciations*” of States, and further to define the scope of positive obligations in order to protect the socio-economic rights of the vulnerable and socially disadvantaged people.⁶⁴ The jurisprudence of the UN and EU on proportionality offers much inspiration for development.

62. *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979). For instance, see *Hudorovič and Others v Slovenia* App nos 24816/14 & 25140/14 (ECtHR, 10 March 2020), at para 158. “*Reiterating, firstly, that the applicants received social benefits which could have been used towards improving their living conditions, secondly, that the States are accorded a wide margin of appreciation in housing matters, and thirdly, that the applicants have not convincingly demonstrated that the State’s alleged failure to provide them with access to safe drinking water resulted in adverse consequences for health and human dignity, effectively eroding their core rights under Article 8 (see paragraphs 115-16 above), the Court finds that the measures adopted by the State in order to ensure access to safe drinking water and sanitation for the applicants took account of the applicants’ vulnerable position and satisfied the requirements of Article 8 of the Convention.*” See also dissenting judgments by Egidijus Kūris and Darian Pavli, *judges*.

63. ECtHR Application No. 43777/13 Judgment 12 July 2016.

64. Palmer, E. “*Beyond Arbitrary Interference: The Right to a Home? Developing Socio-Economic Duties in the European Convention on Human Rights.*” NILQ, vol. 61, no. 3, Autumn 2010, 225-244, at 244.